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No. 94-1173 and 94-1213

In the Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF CALIFORNIA AND CALIFORNIA PUBLIC UTILITIES COMMISSION, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

STATE OF NEW YORK, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission has statutory authority to preempt state regulation of services that are used inseparably for interstate and intrastate communications where the preempted state regulation would defeat the Commission's regulation of the same services.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 39 F.3d 919.[1] The Federal Communications Commission's report and order (Pet. App. B1-110) is reported at 6 F.C.C. Rcd 7571.

[1] Unless otherwise noted, "Pet. App." will refer to the appendix to the petition in No. 94-1173.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1994. The petition for a writ of certiorari in No. 94-1173 was filed on January 3, 1995, and the petition in No. 94-1213 was filed on January 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Federal Communications Commission (Commission or FCC) issued an order preempting three narrow categories of regulation by States of certain services offered by local telephone companies. The court of appeals affirmed that aspect of the agency's action. *California* v. *FCC*, 39 F.3d 919 (Pet. App. A1-A34).

1. This case arises out of several FCC decisions designed to facilitate the provision of enhanced services—a combination of basic telephone service and various computer processing applications—such as WESTLAW, Dow Jones News, and voice mail or remote monitoring services.[2] To that end, the Commission abolished a rule that formerly required telephone operating companies owned by the regional Bell holding companies (BOCs) to offer enhanced services only

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[2] The FCC's decisions were reflected in a series of orders known as "*Computer III*." See *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) - Phase I, Report and Order*, 104 FCC 2d 958 (1986), recon., 2 FCC Rcd 3035 (1987), further recon., 3 FCC Rcd 1135 (1988), second further recon., 4 FCC Rcd 5927 (1989), *Phase I Order* and *Phase I Reconsideration* vacated, *California* v. *FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*); *Phase II, Report and Order*, 2 FCC Rcd 3072 (1987), recon., 3 FCC Rcd 1150 (1988), further recon., 4 FCC Rcd 5927 (1989), *Phase II Order* vacated, *California I*, 905 F.2d 1217 (9th Cir. 1990).

through subsidiaries that were structurally separate from the BOCs' common carrier operations. The purpose of the requirement of structural separation was to deter anticompetitive behavior by the BOCs, such as cross-subsidization and discrimination against competing enhanced-service providers in offering access to the telephone network. The Commission replaced the rule requiring structural separation with nonstructural safeguards designed to prevent anticompetitive behavior without imposing on BOCs the costs of structural separation.

In connection with its new regulatory approach, the Commission originally preempted nearly all state regulation of enhanced services offered by common carriers. See Pet. App. B81. The court of appeals, however, vacated the Commission's orders. *California* v. *FCC*, 905 F.2d 1217 (9th Cir. 1990) (*California I*). The court noted that Section 2(b) of the Communications Act of 1934, 47 U.S.C. 152(b), denies the FCC jurisdiction "with respect to * * * regulations for or in connection with intrastate communication service by wire or radio of any carrier." 905 F.2d at 1239. The Court also noted that under *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355 (1986) (*Louisiana PSC*), the FCC may preempt state regulation of intrastate communications, notwithstanding Section 2(b), when the state regulation effectively negates the exercise by the FCC of its own lawful authority over interstate communication. 905 F.2d at 1242-1243. The court concluded, however, that the FCC's broad preemption orders could not be upheld under that "impossibility" exception to Section 2(b), because the record did not demonstrate "that *all* state-imposed separation requirements" and nonstructural safeguards preempted by the FCC would negate the FCC's policy of permitting the integration of basic and

enhanced services offered on an interstate basis. 905 F.2d at 1243-1245. The Court remanded the case to the Commission to reconsider, *inter alia*, the scope of its preemption action.

2. In light of the court of appeals' decision, the Commission sought further comment on whether and to what degree it should preempt state regulatory policies governing enhanced services. See *Computer III Remand Proceedings: Bell Operating Company Safeguards* (CC Docket No. 90-623), Notice of Proposed Rulemaking, 6 FCC Rcd 174 (1990). The Commission then narrowed the scope of preemption to include only: (1) state requirements for structural separation of personnel and facilities used to provide the intrastate portion of jurisdictionally mixed enhanced services, (2) state rules governing access to customer proprietary network information (CPNI) that are inconsistent with those imposed by the FCC; and (3) state rules requiring that certain technical network information be released at a time different from that required by the FCC's disclosure rule. Pet. App. B89-B90. The Commission preempted those three areas because it concluded that state action concerning those matters would negate the FCC's own regulations of enhanced services.[3] The Commission did not preempt state tariff and rate regu-

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[3] The FCC concluded that state structural separation rules would force carriers to segregate their interstate and intrastate operations, thereby negating the FCC's integration goals. Pet. App. B92-B96. State CPNI access restrictions would have a similar impact because personnel subject to a state access restriction would not be able to access CPNI where permitted under the federal rule. Pet. App. B97. And because initial disclosure of network information may occur but once, a state rule requiring disclosure earlier than the FCC's rule would negate the FCC's rule and its underlying policies. Pet. App. B98.

lation of intrastate services, either where the services were purely intrastate or where they were jurisdictionally mixed.

3. The court of appeals affirmed the preemption aspect of the Commission's order. Pet. App. A1-A34. The court first reaffirmed its holding that *Louisiana PSC* recognizes an "impossibility" exception to Section 2(b). Pet. App. A30. The court then rejected petitioners' contention that the exception applies only when the Commission acts pursuant to specific regulatory duties prescribed by Title II of the Communications Act of 1934, 47 U.S.C. 201 *et seq.*, such as setting rates, but not when it acts to implement the more general goals of Title I—*i.e.*, to "make available, so far as possible * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." 47 U.S.C. 151. Pet. App. A31. The court explained that *Louisiana PSC* recognized that Section 2(b) is a limitation on the Commission's authority that applies equally to Titles I and II of the Act, and that it would accordingly make little sense to conclude that the impossibility exception applies only to the Commission's actions under Title II. See Pet. App. A31-A32.

The court of appeals noted that this Court's opinion in *Louisiana PSC* cited two Fourth Circuit cases, *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787, cert. denied, 429 U.S. 1027 (1976), and *North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036, cert. denied, 434 U.S. 874 (1977) (the *NCUC* cases), as examples of situations that would meet the impossibility exception. The court of appeals observed that in those cases:

> the Fourth Circuit upheld the FCC's preemption of state regulations barring the use of customer

> provided telephone equipment for intrastate service, because they conflicted with the FCC's regulations allowing customers to provide their own telephones for interstate service. The Fourth Circuit acknowledged that it was possible to comply with both the states' and the FCC's regulations: customers could have one telephone for interstate use and one for intrastate use. The court nevertheless agreed with the FCC that it was highly unlikely, due to practical and economic considerations, that customers would maintain two separate phones and, therefore, [the result would be] that customers would use telephone company equipment to comply with state regulations.

Pet. App. A33 (citing *NCUC*, 552 F.2d at 1043). The court found the FCC's preemption of structural separation requirements in this case analogous to the FCC's actions in the *NCUC* cases, because the record demonstrated that the BOCs "would be forced to comply with the state's more stringent requirements, or choose not to offer certain enhanced services, thereby defeating the FCC's more permissive policy of integration." Pet. App. A33. The court similarly concluded that compliance with conflicting state and federal CPNI and network disclosure regulations "would in effect be impossible." *Id.* at A34.

With respect to the substantive parts of the Commission's rulemaking proceeding, the court of appeals affirmed in part and reversed in part. The court held that the Commission had failed to explain adequately its decision to remove the structural separation requirement from the BOCs in light of what the court regarded as a dilution of the Commission's safeguards against access discrimination. Pet. App. A26-A27, A34. The court therefore remanded the case to the

Commission for further consideration of the question of removing the structural separation requirement. In a Notice of Proposed Rulemaking responding to that remand, the Commission has once again asked for comment on the costs and benefits of removing the structural separation requirement from the BOCs. *Computer III Further Remand Proceedings* (CC Docket No. 95-20), Notice of Proposed Rulemaking, FCC 95-48 (released Feb. 21, 1995).

ARGUMENT

The court of appeals correctly decided the narrow preemption issue presented by the petitions in accordance with well-established precedent. Its decision does not conflict with the decision of any other court of appeals. Further review is not warranted.

1. The Communications Act of 1934 (the Act) establishes "a system of dual state and federal regulation over telephone service." *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 360 (1986) (*Louisiana PSC*). Under Section 1 of the Act, "[i]nterstate communications are totally entrusted to the FCC," which is charged with providing a "rapid, efficient, Nation-wide" wire and radio communication service. *National Ass'n of Reg. Util. Comm'rs* v. *FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (quoting 47 U.S.C. 151). Regulatory authority over "intrastate communication service by wire or radio" is withheld from the federal agency pursuant to Section 2(b) of the Act, 47 U.S.C. 152(b).

Although Sections 1 and 2 thus superficially appear to create two distinctly separate spheres of regulation, this Court has recognized that the "realities of technology and economics" blur the boundary line between federal and state regulatory domains. *Louisiana PSC*, 476 U.S. at 360. See also *Public Utility Comm'n of Texas* v. *FCC*,

886 F.2d 1325, 1329 (D.C. Cir. 1989) (*Texas PUC*). Congress has addressed that problem in the context of ratemaking by authorizing a jurisdictional separations process to segregate interstate costs from intrastate costs. 47 U.S.C. 221(c), 410(c). The jurisdictional separations process produces cost information that enables each jurisdiction to regulate the rates for service within its own purview without intruding on the ratemaking "hemisphere" of the other. *Louisiana PSC*, 476 U.S. at 375.

With respect to regulation that does not primarily concern rates, however, the interstate and intrastate aspects of telephone facilities or services cannot be separated so easily. For example, virtually all telephone plant that is used to provide interstate service also is used to provide intrastate service. *Louisiana PSC*, 476 U.S. at 360. Thus, non-ratemaking regulation of telephone lines and equipment almost inevitably affects both interstate and intrastate communications. See, *e.g.*, *Texas PUC*, 886 F.2d at 1333-1335; *North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.) (*NCUC II*), cert. denied, 434 U.S. 874 (1977); *North Carolina Utils. Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.) (*NCUC I*), cert. denied, 429 U.S. 1027 (1976).

In *Louisiana PSC*, this Court held that the FCC lacks authority to preempt state regulations governing the depreciation, for intrastate ratemaking purposes, of telephone plant and equipment. The Court reasoned that "the jurisdictional limitations placed on the FCC by [47 U.S.C.] 152(b), coupled with the fact that the Act provides for a 'separations' proceeding to determine the portions of a single asset that are used for interstate and intrastate service," foreclose the Commission from preempting state regulation of intrastate rates. 476 U.S. at 369. The Court noted that it is "certainly possible to

apply different rates and methods of depreciation * * * once the correct allocation between interstate and intrastate use has been made." *Id.* at 375 (citing 47 U.S.C. 221(c), 410(c)).

At the same time, the Court recognized the absence of clear jurisdictional boundaries for regulation of communications outside the ratemaking context. The Court thus distinguished its decision, which depended so significantly on the separations-defined boundary between interstate and intrastate *rates*, from cases "in which FCC preemption of state regulation was upheld where it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation." *Louisiana PSC*, 476 U.S. at 375 n.4 As the court of appeals noted, *Louisiana PSC* cited the Fourth Circuit's *NCUC* cases as examples of situations that would meet that "impossibility exception." The court of appeals correctly applied the teaching of those cases to conclude that the FCC's narrow preemption of inconsistent state action here is permissible, because the FCC regulations concern only jurisdictionally mixed enhanced services, Pet. App. A31, and compliance with both state and federal regulations, while technically feasible, is "in effect * * * impossible." *Id.* at A32-A34.

2. Petitioners are wrong to contend (New York Pet. 14-15; California Pet. 10-12) that the impossibility exception does not apply at all when the FCC's purpose is to avoid frustration of rules it adopts pursuant to Section 1 of the Act, 47 U.S.C. 151. The Act does not distinguish between preemption in support of the general provisions of the Act (*e.g.*, Section 1) and preemption in support of actions taken pursuant to explicit statutory authority (*e.g.*, Title II), and no case from this Court or any court of appeals has placed significance on the distinction on which petitioners rely. Indeed, in *Capital*

Cities Cable, Inc. v. *Crisp*, 467 U.S. 691, 708 (1984), the Court affirmed the FCC's preemption of state regulations that interfered with its Section 1 mandate.[4] See also *Public Service Comm'n of Maryland* v. *FCC*, 909 F.2d 1510, 1512-1516 (D.C. Cir. 1990) (*Maryland PSC*) (applying impossibility doctrine to FCC orders issued solely under Title I of the Act). The Court reached a similar conclusion under the Federal Power Act, in resolving conflicts between a federal agency's general statutory goals and the States' statutory authority over intrastate regulation. See *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354 (1988) (upholding preemption under FERC's broad statutory charge to promote development of interstate power pools despite express statutory reservation of authority to the States to oversee retail sales); see also *City of New York* v. *FCC*, 486 U.S. 57, 66-70 (1988).

Moreover, *Louisiana PSC* did not, as the New York petitioners contend (New York Pet. 19-21), limit the impossibility exception to situations where the FCC has exercised its statutory authority over common carriers under Title II of the Act. Footnote 4 of the Court's opinion, which discussed the impossibility exception, is part of the Court's discussion of the significance of jurisdictional separations proceedings, which responded to the Commission's preemption theories under *both* Title I (Section 151) *and* Title II (Section 220): "In our view, the jurisdictional limitations placed on the FCC by

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[4] *Capital Cities* did not involve Section 2(b), but its reasoning is consistent only with the proposition that the FCC's authority to preempt is as great under Section 1 as under the more explicit provisions of other Titles. See *Computer & Communications Industry Ass'n* v. *FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

§ 152(b), *coupled with* the fact that the Act provides for a 'separations' proceeding to determine the portions of a single asset that are used for interstate and intrastate service, 47 U.S.C. § 410(c), answer *both* preemption theories." *Louisiana PSC*, 476 U.S. at 369 (emphasis added). The Court did not even begin to analyze the Commission's Title II (Section 220) preemption argument until the subsection of *Louisiana PSC* that *follows* footnote 4. See *Louisiana PSC*, 476 U.S. at 376-378. Furthermore, contrary to petitioners' claim (New York Pet. 21-22), the *NCUC* cases that this Court cited to illustrate the scope of the exception involved the FCC's exercise of preemptive authority under *both* Title I *and* Title II. See *NCUC II*, 552 F.2d at 1043, 1046-1047. Indeed, the New York petitioners elsewhere concede that point, admitting that "[i]n upholding the FCC's action[s], the Fourth Circuit * * * endorsed [S]ection 151 as a source of preemptive powers." New York Pet. 10.

3. The California petitioners are also wrong to suggest (California Pet. 10-12) that the court of appeals misapplied the impossibility exception because that exception requires physical impossibility. As the court of appeals explained (Pet. App. A33), the *NCUC* cases specifically recognized that compliance with state and federal rules, while technically feasible in the sense that each customer could have different telephones for interstate and intrastate use, was not possible as a practical matter. See *NCUC II*, 552 F.2d at 1043, 1049; *NCUC I*, 537 F.2d at 791. The key element of the Fourth Circuit's reasoning was that it was "not feasible, as a matter of economics and practicality of operation, to limit the use of [the] equipment to either interstate or intrastate transmissions." *NCUC I*, 537 F.2d at 791. That is the same legal principle on which the decision below turned (see Pet. App. A32-A33), and there is

accordingly no merit to petitioners' claim (California Pet. 12-17) that the ruling below conflicts with the *NCUC* cases.[5]

The California petitioners also suggest in passing (California Pet. 16 n.15) that the court of appeals' decision conflicts with the D.C. Circuit's decision in *Maryland PSC*, because the D.C. Circuit "recognized" in that case that economic burdens cannot justify preemption. That argument mischaracterizes *Maryland PSC*. In that case, the D.C. Circuit expressed "doubt" that preemption of a state regulation could be justified "simply on the grounds * * * that it imposes too great an economic burden on carriers engaged in both interstate and intrastate communications." 909 F.2d at 1516. The court went on to hold, however, that regulations of intrastate communications *can* be

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[5] The California petitioners claim that, unlike the *NCUC* cases, the "decision below allows the FCC to unilaterally define a situation of 'impossibility' " and thereby preempt state regulation "whenever the FCC believes that compliance with state requirements would either be too costly or too burdensome for the company." California Pet. 14, 16. The New York petitioners similarly contend (New York Pet. 25) that the court of appeals' decision will lead to a "slippery slope * * * empower[ing] FCC officials to preempt whatever state regulation stands in the way of" their general objectives. The court of appeals, however, did not purport to hold that the Commission has unreviewable discretion to preempt state regulations whenever it deems that course advisable. To the contrary, the history of this litigation, especially the court's vacatur of the Commission's original preemption orders, belies that broad reading of the court's opinion. The court merely held that the record in this case justifies the FCC's conclusion that economic and operational factors make the separation of mixed jurisdictional services and facilities practically impossible. Pet. App. A32, A34. Petitioners do not contend that that factual conclusion warrants this Court's review.

preempted if those regulations "impose costs on interstate service that the FCC believes are unwarranted" and the interstate and intrastate aspects cannot feasibly be "unbundled." *Ibid.* See also *Texas PUC*, 886 F.2d at 1332-1334; *Illinois Bell Telephone Co.* v. *FCC*, 883 F.2d 104, 113-115 (D.C. Cir. 1989); *National Ass'n of Reg. Util. Comm'rs* v. *FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989). That analysis closely parallels the views expressed by the court of appeals in this case. See Pet. App. A32-A34.

Finally, review of petitioners' claims is not warranted for the additional reason that it is unclear at present what form the FCC's substantive regulations concerning separation will ultimately take. As we have noted (p. 7, *supra*), following the Ninth Circuit's remand on the substantive regulatory issues, the Commission issued a Notice of Proposed Rulemaking requesting comment, *inter alia*, on whether a balance of the relevant costs and benefits justifies the removal of structural separation. If the Commission should decide not to remove structural separation, there would be no occasion for this Court to consider the degree to which States may interfere with current federal regulatory choices concerning separation.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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